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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 909

GIRTEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN ANDERSON, JR.,
Attorney General,
State of Kansas.

CHARLES C. W. BRENNEISEN,
City Attorney,
City of Kansas City, Kansas.

JOSEPH T. CAREY,
Deputy City Attorney,
City of Kansas City, Kansas.

JOHN WILLIAM MAHONEY,
Special City Attorney,
City of Kansas City, Kansas.

CHARLES S. RHYNE.
HERSEL H. E. PLAINE,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.

Attorneys for Respondents.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The facts are largely set out in the opinion of the Kansas Supreme Court, 186 Kansas 190, which is printed as Appendix A to the petition for the writ.

The Fairfax Industrial District is an area of approximately 2500 acres which lies north and east of Kansas City, Kansas, completely surrounded by the

city boundaries and the Missouri River. For years the city has extended benefits to the area including water, light, power and other municipal services. The district is an urban area, with substantial economic and sociological ties to Kansas City.[1]

In early 1958, Kansas City, acting under authority of Kansas General Statutes 13-1602, 1949, and in keeping with the Kansas Supreme Court's interpretation thereof, enacted Ordinance 41525,[2] which annexed approximately 190 acres of the area including property owned by the petitioners.

In Kansas the rule is well settled that any attack on an annexation ordinance, since it involves the corporate existence of a municipal corporation, may be brought only by the state in a *quo warranto* proceeding on relation of the attorney general or, under him, the county attorney.[3] In 1958 the county attorney commenced a

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[1] *State ex rel Martin* v. *City of Kansas City*, 181 Kan. 870, 872.

[2] Adopted March 25, 1958. The cited statute confers several grants of authority on the city to achieve annexation. Under one branch of authority, the city may annex any amount of unplatted land which "lies within (or mainly within) any city." Pursuant to the interpretation of this phrase by the Kansas Supreme Court, *State ex rel Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P. 2d 806 (1957), requiring a common perimeter with the city boundary of more than 50% of the total perimeter of the annexed area, Kansas City adopted Ordinance No. 41525. The approximately 190 acres annexed had an entire perimeter of 11,222.16 ft., of which 5,732.54 ft., or more than 50%, comprised a common boundary with the City at the time of annexation. The Kansas Supreme Court had recognized the area as unplatted land, *ibid*, 181 Kan. 870, 875.

[3] *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101 (1949) which collects the cases and sums up that "the rule, founded on public policy . . . has been the settled law of this state for more than half a century . . . ." Recently the Kansas legislature re-

quo warranto proceeding on behalf of the state to test Ordinance No. 41525, and others which are of no importance here.[4]

The defendants were Kansas City and Quindaro Township, which formerly had jurisdiction over the annexed tract. Following pleadings by the parties, the Kansas Supreme Court appointed a Commissioner on June 30, 1959, to hear evidence and recommend findings. In July, the State's Attorney General came into the case. Having reached the view that the statutory annexation conditions had been met, that the common perimeter of the city and tract boundary was more than 50% of the total tract boundary, that there were not

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affirmed the rule in enacting G.S. 12-502c (1957) which placed a one year limitation on the bringing of such actions. The underlying statute authorizing *quo warranto* is G.S. 60-1603.

[4] Ordinance No. 41525, briefly described in footnote 2 above, and set out in full at page 33 of the Transcript of the Record, is the only ordinance directly involved in this case, notwithstanding mention by petitioners of six ordinances (Petition, p. 4). Ordinance No. 41358 of December 10, 1957, was repealed by No. 41525, thus eliminating a dispute over the description of the boundaries of the annexed area and slightly reducing its size; and passage of No. 41427, which covered a small portion of the tract in the repealed ordinance, was abandoned after its first reading of January 14, 1958. Hence the meaning of the city's "admission" in the pleadings respecting these two repealed and abandoned ordinances was obviously not "invalidity" as claimed by petitioners (Petition, pp. 4, 14, n. 4), but "nonexistent" and therefore not relied upon for validity of the annexation. Ordinances No. 41557 of April 15, 1958, No. 41659 of June 24, 1958, and No. 41700 of July 22, 1958, each involved a small portion of less than 20 acres of the tract covered by No. 41525 and were adopted under a second branch of the statutory authority (GS 13-1602) authorizing annexation of less than 20 acre tracts. These were adopted out of an abundance of caution and were not and are not necessary for the support of the annexation made in this case.

sufficient grounds for maintenance of the action, and that in view of the expense incurred in previous cases prosecution in this case amounted to an harassment of the city, he concluded that it would be in the public interest to terminate and dismiss the present action.[5] On July 22, 1959, the Attorney General moved to intervene and supersede the county attorney, to remove Quindaro Township from the case as having no justiciable interest, and to dismiss the action.

At a hearing before the Commissioner, in August, 1959, the county attorney affirmed his acquiescence in being superseded. The Township asked for a stay against the Attorney General. The four private corporations, who are the petitioners here, asked for leave to intervene and to maintain the action themselves as relators for the state alleging that otherwise their property would be subjected to municipal taxes levied, and to municipal burdens imposed, by Kansas City with no opportunity to have the issue of whether the annexation is void determined by the court.[6]

The Commissioner's conclusions were that the Attorney General could not supersede the county attorney and dismiss the case, that Quindaro Township could maintain the action to a final conclusion, and were it not for these conclusions the four corporations might be allowed to intervene and maintain the action.[7]

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[5] Supplemental Transcript of Record, Reply of Attorney General to Quindaro Township Motion for Rehearing, page 8; 186 Kan. 190, 192, Petition, p. 3a.

[6] See, as an example of the four petitions, the petition of Phillips Petroleum Company, Transcript of Record pp. 96-97; 186 Kan. 190, 194, Petition, pp. 5a-6a.

[7] Petition, Appendix B.

The Kansas Supreme Court, in its unanimous opinion of March 5, 1960,[8] disagreed with these conclusions. The Court held that the Attorney General could, as a matter of law, and did, and in fact, supersede the county attorney; and "If, therefore, the Attorney General considered the action unmeritorious, he not only had the authority, but he also had a duty to move for dismissal."[9] The Court further held that neither Quindaro Township nor the individual interveners had any status to question the city's annexation of new territory "which is a reorganization of the city that in turn involved its corporate validity. Such an attack can only be made by the state."[10] The Court terminated the proceedings by ordering the case dismissed.[11]

ARGUMENT

I

THE ISSUE

Petitioners, without asserting in their petition to this Court that the annexation or ordinance upon which it rests is invalid,[12] claim that as a matter of law they

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[8] 186 Kan. 190, Petition, Appendix A.

[9] 186 Kan. 190, 197; Petition, p. 10a.

[10] Citing the Kansas cases and those of other jurisdictions, 186 Kan. 190, 198; Petition, p. 12a.

[11] 186 Kan. 190, 199; Petition, page 14a.

[12] In their petitions to intervene in the proceedings below before the Kansas Supreme Court Commissioner, petitioners adopted the reasons set out in the amended and supplementary petition in *quo warranto* as their reasons for claimed invalidity of the annexation. See e.g. Transcript of Record, p. 93. Most of these dealt with the five ordinances which, as set out in n. 4, supra, were not relied upon and were either repealed, abandoned, or surplus to No. 41525.

are entitled in their own right to challenge the legality of the ordinance, and that the denial of their alleged right of challenge in a court is a denial of due process and equal protection under the Fourteenth Amendment.[13] The deprivation under the Fourteenth Amendment is envisaged as follows:

> "If petitioners are not now permitted to secure a judicial determination as to the legality of the ordinances they will be wholly without a remedy when the City of Kansas City takes their property by taxation, although that taking is unlawful unless the ordinances of annexation are valid."[14]

Petitioners concede that the state legislature could have directly accomplished the annexation in the same language as the ordinance, without any right to a hearing.[15] They so concede because such legislative action (changing the boundary of a political subdivision and annexing land under the jurisdiction of one to the jurisdiction of another) resulting in the subjection of the annexed property to taxation or to increased taxation by a new or different political subdivision, even without consent and over the opposition of the property owner, is lawful and consistent with due process of law.[16]

Petitioners further concede that the state legislature may properly delegate the annexation function to a

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[13] Petition, p. 7.

[14] Petition, p. 8.

[15] Petition, p. 9.

[16] Petition, p. 9; *Hunter* v. *Pittsburgh*, 207 U.S. 161.

political subdivision such as Kansas City,[17] and that if the delegated function is properly exercised by the political subdivision, the annexation is lawful. As they succinctly put it, "If the ordinances are valid petitioners have no basis for complaint."[18]

Thus the question narrows down to whether the exercise by a municipality of the legislative function of annexation is subject to challenge in a court and, if so, by whom. To this petitioners would add, if the right of challenge is denied by a state to a private landowner in the tract affected, does this comport with due process and equal protection of the laws?

II

Reasons for Denying the Writ

A. Petitioners Have No Standing To Sue Or To Prosecute This Appeal

In Kansas, as in many states, the rule is settled that an attack on an annexation ordinance may be made in a *quo warranto* action against the annexing municipality but brought only by the state in the discretion of its proper officers.[19] The latter include the State Attorney

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[17] Delegation of legislative power to municipalities is a well established, time honored exception to the general rule against delegation of legislative powers. *New Orleans Waterworks* v. *New Orleans*, 164 U.S. 471, 481; *Brodbine* v. *Revere*, 182 Mass. 598, 66 N.E. 607 (1903). Included in this exception is the delegation to cities of the annexing power. 64 ALR 1379 et seq.

[18] Petition, p. 8.

[19] *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101 (1949), *Lampe* v. *City of Leawood*, 170 Kan. 251, 225 P. 2d 73 (1950). An array of like authorities in other states is collected in 13 ALR 2d 1279.

General and the county attorney, but a county attorney may be superseded by the State Attorney General, as occurred in this case.[20]

The reason for limiting the action to state officials is one of sound public policy. An attack on an annexation ordinance throws the corporate existence of a municipal corporation into question, and to permit any and all disgruntled individuals to launch such attacks, whether frivolous or not, would lead to uncertainty and interminable confusion in city affairs and result in a breakdown of municipal government.[21]

Thus, in Kansas, an individual property owner and taxpayer [22] has no standing to sue in an action to ques-

[20] 186 Ka. 190, Petition, Appendix A; *State* v. *Finch*, 128 Kan. 665, 280 P. 910 (1929).

[21] Only the state acting in direct proceedings can challenge the validity of a municipal corporation. *Shapleigh* v. *San Angelo*, 167 U.S. 646, 655-656; *Tulare Irrigation District* v. *Shepard*, 185 U.S. 1, 14.

The Kansas Court, in denying the existence of any private rights in the status quo of the political subdivision and therefore denying any right of private attack on an annexation directly (*Smith* v. *City of Emporia*, *supra*) or collaterally (*Topeka* v. *Dwyer*, 70 Kan. 244, 78 P. 417 (1904)), have stated that the consequences to society of allowing a private attack upon the existence of cities would be intolerable, and hence courts are concerned "not if there exists a valid law, but if considerations of the public welfare shall forbid any inquiry as to whether or not there is a valid law, not if constitutional limitations have been transgressed, but if the public tranquility and the effective administration of government require that the matter of validity, or invalidity, shall be ignored, and a situation of affairs be arbitrarily recognized as if it were legal, whether in fact it be so or not." 70 Kan. 244, 249. See also *Gardner* v. *Benn*, 81 Kan. 442, 105 P. 435 (1909).

[22] This limitation on the right of individual to question legislative action in judicial proceedings where standing is predicated on the status of taxpayer is recognized elsewhere. *Massachusetts* v. *Mellon*, 262 U.S. 447.

tion an annexation ordinance, either directly or collaterally.[23] Petitioners in effect are asking this court to overturn decisions and policy carefully evolved by the courts and legislature of Kansas in order to improvise for petitioners an individual judicial remedy in place of the established representative remedy (combining legislative, administrative, and judicial aspects, summarized under heading B, below), simply because they have disagreed with the representative of the state, the Attorney General of Kansas, on the desirability of resorting to judicial review.

The request is analogous to urging that because the public prosecutor decided not to seek an indictment, or has moved to dismiss an indictment brought, members of the public, particularly those claiming to have been wronged by the defendant, may step in and prosecute.

A difference of view on how litigation should be handled or turn out, does not give rise to standing where the dissident had no standing to begin with. The petitioners would have this Court create individual standing to sue not only where none existed, but where, historically and for good and sound policy reasons, individual standing has been deliberately withheld in favor of the standing of the legal officers of the state, clothed with discretion to sue upon an exercise of their best judgment. The suggested improvisation, we submit, is beyond the scope of action by this Court.

B. There Is No Substantial Federal Question To Be Determined

Petitioners urge the improvisation of this individual right to challenge the annexation ordinance because without it, they contend, they are denied due

[23] Cases and statute cited in notes 3, 19, and 21 supra.

process and equal protection under the Fourteenth Amendment.

This Court has held repeatedly that the state may expand or contract the territorial area of municipal corporations with or without the consent of the citizens or even against their protest, and that it may do so "unrestrained by any provision of the Constitution of the United States."[24] Specifically, this court has rejected the contention that the Fourteenth Amendment was violated by such state action.[25] Petitioners do not deny, in fact they concede, this proposition;[26] but argue that the Fourteenth Amendment violation takes place when they as individual property owners are not permitted to obtain the judgment of a court that Kansas City did or did not properly exercise the annexation powers of the state which were delegated to it.[27]

But if, as here, in delegating annexation powers to Kansas City (and other cities) the state has reserved for itself alone, through the Attorney General,[28] the right to question the manner of the delegate city doing what the state itself could do unhampered by the Fourteenth Amendment, it becomes difficult to perceive any right of an individual which has been taken without due process of law if the state chooses not to question the exercise of the powers. Likewise, it is difficult to understand how any one individual in the state has been deprived of equal protection of the laws when the laws,

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[24] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179; *Kelly* v. *Pittsburgh*, 104 U.S. 78; and see other cases cited at 207 U.S. 178.

[25] Ibid.

[26] Petition, p. 9.

[27] Petition, pp. 9-10.

[28] The supremacy of the Attorney General over the county attorney was settled by the Kansas courts.

with propriety, have conferred on no individual the right to challenge, but have reserved that right to the state acting through designated officials.[29]

Boiled down, the petitioners' argument is that before their property is transferred from one taxing jurisdiction to another, and subjected to the current taxation of the annexing city, it is their right to have the annexing ordinance tested by the courts and for the courts to say that the ordinance is valid or not, irrespective of the views of the officials of the state to whom the primary decision has been entrusted. This is merely rearguing *Hunter* v. *Pittsburgh* which in recognizing the plenary power of the state to expand or contract the territorial area of its municipal corporations or other political subdivisions, held:

> "All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or other-

[29] What petitioners are arguing is that because the state has brought the testing action in some cases, failure to bring or continue it here is a denial of "equal protection". (Petition, pp. 11-13.) The logic of such a view would make mandatory the testing by the state of every annexation, a result clearly not contemplated under the law nor required by any provision of the state or federal constitutions.

wise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." [30]

Petitioners' argument that they are entitled, as of right, to a court test of the annexation ordinance before their property is transferred to the new taxing jurisdiction, ignores the holdings of this Court that process, other than a judicial determination, is due process of law in the consummation of political boundary line changes and the imposition of tax burdens.[31] Under Kansas law a city may annex territory, pursuant to certain standards prescribed by general statutes, and after notice to county officials and two public meetings, which affords opportunity, in the first instance, for persons concerned to be heard and to support or oppose the proposal, if they desire, before the governing body of the city.[32] Thereafter, if the annexation is consummated, the law reposes in the State Attorney General, or under him the county attorney, authority to administratively determine that the city has complied with the requirements of law. That official is open to persuasion by private persons that the municipal action was proper or improper, but the judgment is

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[30] 207 U.S. 161, 179.

[31] *Kelly* v. *Pittsburgh*, 104 U.S. 78; *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 707-710; *Davidson* v. *New Orleans*, 96 U.S. 97; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112.

[32] Kansas G.S. 13-1601, 1602; 13-2901, 13-2902, as revised L. 1959 ch. 64.

his.[33] If, in his judgment, there has been no failure of compliance, that is the end of the matter. If the Attorney General, or under him the county attorney, is of the view that the action taken was or may have been in violation of law, he may, on behalf of the state, within one year, bring an action in *quo warranto* and obtain a judicial decision.[34] Thus, there is a complete pattern of legislative and administrative process, coupled with discretionary resort to judicial review if review is warranted in the judgment of the public officers in charge.

The exclusion of private citizens from the judgment that judicial review is needed, or from prosecution of the appeal of the public question, is not a denial of, nor is it inconsistent with, due process of law or equal protection of the laws.

Petitioners have not alleged, and cannot in truth point to any special or peculiar injury to their property or personal rights which would call for deviation from the pattern of procedure provided by Kansas in this case. They have merely assumed throughout their argument (Petition, pp 8, 9, 10) that subjection of their property to nondiscriminatory reasonable taxation by Kansas City (in place of Quindaro Township) is an injury and sufficient injury which calls for federal

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[33] In fact, in this case, the county attorney was prevailed upon to challenge the city's action, but later acquiesced in the Attorney General's view when the latter reached a different conclusion and requested and obtained dismissal of the challenge, 186. Kan. 190, 195; Petition, p. 8a. The petitioners addressed letters to the Attorney General which outlined their position, so that he might exercise his discretion on whether or not to attack the ordinance on behalf of the state. See, for example, the letter of the Phillips Petroleum Corp., Transcript of Record, pages 98-99, which was typical of the letters sent by each of the petitioners.

[34] Kansas G.S. 12-502c.

intervention. This is contrary to the rulings of this Court,[35] and petitioners' request for federal intervention goes beyond the settled limitations of federal jurisdiction in this regard.[36]

Conclusion

It is respectfully urged that the petitioners are without standing to sue in this proceeding or before this Court, and that in any event their petition raises no substantial federal question which would entitle them to invoke the jurisdiction of the Court.

Respondents respectfully move that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas be denied.

Respectfully submitted,

John Anderson, Jr.,
Attorney General,
State of Kansas.

Charles C. W. Brenneisen,
City Attorney,
City of Kansas City, Kansas.

Joseph T. Carey,
Deputy City Attorney,
City of Kansas City, Kansas.

John William Mahoney,
Special City Attorney,
City of Kansas City, Kansas.

Charles S. Rhyne,
Herzel H. E. Plaine,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.
Attorneys for Respondents.

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[35] Cases cited, notes 24 and 31, *supra*.

[36] Any imputed support for petitioners' position in the reference (Petition, p. 9 n 2) to the grant of certiorari in *Gomillion* v. *Lightfoot* is inapropos. In that case the charge is made that the state legislature misused its powers in fixing municipal boundaries as a device to cut off voting rights of a group of its Negro citizens.